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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

T.B., Allison Brenneise and Robert Brenneise, Plaintiffs, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Defendant.	Case No. 08 CV 0028 WHQ WMc (Consolidated with 08 CV 00039 WQH WMc) **SAN DIEGO UNIFIED SCHOOL DISTRICT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS AND/OR STRIKE COUNTERCLAIMS AND FOR SANCTIONS** Date: September 8, 2008 Time: 9:00 a.m. Courtroom: 4 Judge: Hon. William Q. Hayes Trial: None Set Complaint Filed: January 4, 2008 **NO ORAL ARGUMENT UNLESS REQUESTED BY COURT**
SAN DIEGO UNIFIED SCHOOL DISTRICT, Plaintiff, v. T.B., a minor, Allison Brenneise and Robert Brenneise, his parents, Steven Wyner, and Wyner and Tiffany, Defendants.	

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I. INTRODUCTION

The San Diego Unified School District ("District") hereby moves to dismiss the First, Second and Third Counterclaims for Relief filed by T.B., Allison and Robert Brenneise ("Brenneises") with their Answer, on the grounds that they have failed to state any claims upon which relief may be granted, and have failed to exhaust their administrative remedies with respect to their First and Second Counterclaims. Actually, this Court has already dismissed their Second Counterclaim, as the Brenneises have merely restated the very claim that was dismissed by this Court just twenty days before they re-filed it as a Counterclaim without any substantive change. On that basis, this Court should exercise its statutory and inherent authority to sanction the Brenneises' counsel, for re-filing dismissed claims, needlessly increasing the cost of this litigation and in willful defiance of this Court's Order.

II. PROCEDURAL HISTORY

On January 4, 2008, the Brenneises filed a complaint in this Court seeking review and reversal of all the ways in which the Office of Administrative Hearings ("OAH") ruled against them following a 27-day due process hearing in May, June and July of 2007. (Document #1). They also sought the entirety of attorneys' fees and costs incurred by the family in litigating their due process complaint and defending against the District's filing, despite their minimal success in both. (Id.) On that same day, the District also filed a complaint in this Court seeking review and reversal of certain aspects of the OAH Decision, the attorneys' fees and costs it incurred in defending against frivolous claims presented by the Brenneises and their attorneys for improper purposes, and declaratory relief. (Document # 1 (U.S. District Court, Southern District of California, Case No. 08-CV-0039 WQH WMc ("District's Action"))). These cases were subsequently consolidated on an unopposed[1] motion of the District. (Documents # 9, 9 (District's Action)).

On March 12, 2008, the Brenneises filed an amended complaint ("Amended

[1] While the Brenneises did not oppose the motion once filed, their counsel refused to stipulate to consolidation, forcing the District to file a motion requesting such.

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Complaint") as a matter of right, now the operative complaint, wherein they added two additional causes of action to their initial complaint, one for violation of the Individuals with Disabilities Education Improvement Act ("IDEA") and one for attorneys' fees as prevailing party in a compliance complaint. (Document # 12). Of particular relevance for purposes of this motion is Plaintiffs' Third Claim for Relief in the Amended Complaint, brought under the IDEA. The Third Claim alleged that the District denied T.B. a free, appropriate public education ("FAPE") when it failed to implement the OAH Decision. Specifically, the Brenneises claimed that the Decision required the District to ensure a school nurse was present to assist T.B. with g-tube feedings. In addition, the Brenneises alleged that the Decision required the District to provide occupational therapy ("OT") services through T.B.'s private OT provider but did not do so. The Brenneises argued that these alleged failures to implement the IEP, as modified by OAH, denied T.B. a FAPE after the Decision had issued and warranted further relief. (Amended Complaint, ¶ 32). Inconsistently, the Brenneises also challenge the Decision in their Amended Complaint, the same as they had in their initial complaint, such that they simultaneously sought to enforce and reverse the same Decision.

On April 3, 2008, the District filed a motion to dismiss this Third Claim for Relief on the basis that the Brenneises were not aggrieved by the findings they sought to enforce and, in any case, had failed to exhaust their administrative remedies as to events arising subsequent to the OAH hearing, both of which deprived this Court of jurisdiction. (Document # 15).

On June 24, 2008, this Court issued an order ("Order") dismissing the Brenneises' Third Claim for Relief. The Court found that the Amended Complaint included an appeal of the Decision, sought enforcement of components of the Decision based on an alleged failure to implement the Decision they were appealing. Order 14:28-15:6. The Court ruled that the appeal of the Decision is related to its enforceability, and thus concluded that a claim for failure to implement the Decision was "premature," citing to *Mouby v. Independent School District No. 696*, 951 F. Supp. 867, 886 (D.Minn. 1996). Order, at 15:10. The Court did not grant leave to amend.

Nonetheless, on July 14, 2008, five days *after* their responsive pleading was due pursuant to Federal Rules of Civil Procedure Rule 12, subsection (a)(4)(A), the Brenneises filed an answer to the District's Complaint, and also asserted three counterclaims against the District under Section 504 of the Rehabilitation Act of 1973 ("Section 504") and the Americans with Disabilities Act ("ADA"). Aside from the impropriety of refiling a claim just dismissed, and filing what is essentially a second amended complaint without seeking leave to amend, both the First and Second Counterclaims should be dismissed in their entirety because the Brenneises' have failed to exhaust their administrative remedies under the IDEA. The First, Second and Third counterclaims should also be dismissed in their entirety for failure to state a claim upon which relief can be granted.

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III. ARGUMENT

A. The Brenneises' First and Second Counterclaims Must Be Dismissed Because They Have Failed to Exhaust Their Administrative Remedies on These Claims

The District moves to dismiss the Brenneises' First and Second Counterclaims, on the grounds that they have failed to exhaust the administrative remedies available to them under the IDEA to redress the educational injury claimed therein. *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1163 (9th Cir. 2007). The exhaustion requirement applies whenever a plaintiff "seek[s] relief for injuries that could be redressed to any degree by the IDEA's administrative procedures." *Ibid.* Where "a plaintiff is required to exhaust administrative remedies but fails to, the federal courts do not have jurisdiction to hear the plaintiff's claim." *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 920-21 (9th Cir. 2005); *Dreher v. Amphitheater Unif. Sch. Dist.*, 22 F.3d 228, 231 (9th Cir. 1994) (court properly found subject matter jurisdiction because the plaintiff had exhausted their administrative remedies); *Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 810 (10th Cir. 1989) (court lacked jurisdiction to hear merits when plaintiff failed to exhaust administrative remedies).

The IDEA states:

> Nothing in this chapter shall be construed to restrict or limit the

> rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990... title V of the Rehabilitation Act of 1973..., or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) [state and local level due process hearings] of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(l). Accordingly, the exhaustion requirement of the IDEA explicitly applies to "other Federal laws protecting the rights of children with disabilities," including Section 504 and the ADA. 20 U.S.C. § 1415(l); *see also, Robb v. Bethel School Dist. # 403*, 308 F.3d 1047, 1050 (9th Cir. 2002).

Where there is a question about whether the IDEA's administrative machinery can redress the injury, exhaustion is required. *Robb,* at 1049-54.

> For purposes of exhaustion, 'relief that is also available under' the IDEA does not necessarily mean relief that fully satisfies the aggrieved party. Rather, it means 'relief suitable to remedy the wrong done the plaintiff, which may not always be relief in the precise form the plaintiff prefers.'

Blanchard v. Morton Sch. Dist., 420 F.3d 918, 921 (9th Cir. 2005) (*quoting Robb, supra,* at 1049). In other words, the fact the Brenneises are seeking damages in the form of relocation cost and for emotional distress, neither of which are remedies available under the IDEA, does not excuse them from the exhaustion requirement when the underlying injury they seek to redress is regarding the appropriateness of T.B.'s educational program.

1. The Brenneisses Have Failed to Exhaust Claims Plead in Their First Counterclaim Which Arose After the Time Period Covered in the Hearing

The Brenneises' First Counterclaim alleges a failure to provide for g-tube feedings in T.B.'s IEP for the 2006-2007 and 2007-2008 school years. They claim that as a result, T.B. was denied a FAPE and his family was forced to relocate to Minnesota. (Counterclaim, at 11:11-19). These allegations demonstrate the failure to exhaust administrative remedies on their face, in that they allege denials of FAPE *after* the administrative hearing took place and *after* the

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annual IEP at issue in that hearing expired by its own terms on December 3, 2007. It is undisputed that the relocation to Minnesota took place long after the hearing record closed. It goes without saying that this Court lacks jurisdiction to rule, for the very first time without the benefit of any developed record, whether the Brenneises were "forced to relocate" out-of-state "[i]n order to obtain a FAPE for Student." (Counterclaim, at 11:16-17).

The Brenneises "cannot seek to litigate claims in federal court that arose subsequent to the time period at issue in the underlying proceeding." *J.W. ex rel. J.E.W. v. Fresno Unified School Dist.*, --- F.Supp.2d ----, 2008 WL 2698647, *4 (E.D.Cal. 2008), *citing Metropolitan Board of Public Educ. v. Guest*, 193 F.3d 457, 463 (6th Cir.1999) (court exceeded its jurisdiction to the extent it ruled on issues from subsequent school years not at issue in administrative hearing); *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 283-84 (3d Cir.1996) (claims arising after conclusion of administrative hearing and claims not raised in that hearing must be exhausted, and cannot be raised in due process appeal). Because the Brenneises seek relief for an "educational injury" caused by alleged failures to develop and implement an appropriate IEP, all clearly redressible by the IDEA, these new claims are subject to the exhaustion requirement and must be dismissed. (Counterclaim, at 11:25-26). *Kutasi*, at 1163.

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2. The Brenneises Have Failed to Exhaust Their Administrative Remedies as to Their Failure to Implement Claims in the Second Counterclaim

The Brenneises' Second Counterclaim, for an alleged failure to implement the December 4, 2006 IEP as modified by OAH, must also fail. Besides the fact it has already been dismissed by this Court, it too alleges "educational injuries" clearly redressible by the IDEA's comprehensive scheme, as demonstrated by the fact that the Brenneises asserted these exact claims under the IDEA in their Amended Complaint before filing this Counterclaim. (Counterclaim, at 13:25; 14:5-6; Order, at 15:9-103). In its Order dismissing such claims, the Court explicitly recognized that they were redressible under the IDEA. Whether or not the District has in fact failed to implement the OAH Decision and whether or not any such failure would rise to a substantive denial of FAPE were never raised in the hearing, and indeed, occurred after the hearing was concluded and a decision rendered.

No administrative body has found, or even been asked to find, that the District failed to implement any portion of the Decision, much less the specific portions of the Decision of which the Brenneises now complain. Moreover, no administrative body has ever found, or even been asked by the Brenneises to find, that any such failure to implement, if in fact true, resulted in a substantive denial of FAPE or entitled T.B. to any remedy available under the IDEA. Because there is nothing for the Court to review, and the Brenneises cannot be aggrieved by claims that were never heard or resolved by any State administrative agency, the Court should dismiss, with prejudice, the Second Counterclaim due to lack of subject matter jurisdiction.

The District acknowledges that current Ninth Circuit authority holds that a parent is not required to exhaust his or her administrative remedies when he or she simply seeks to enforce a final unappealed due process hearing order in his or her favor. *Porter v. Board of Trustees of Manhattan Beach Unif. Sch. Dist.*, 307 F.3d 1064 (9th Cir. 2002). However, as this Court has already decided, the Brenneises are not seeking to enforce a favorable final decision. They are challenging the very same aspects of the decision that they are seeking to enforce, and therefore the Decision is not final for purposes of enforcement. (Order, at 15:9-13). Furthermore, as explained in the District's Motion to Dismiss the Third and Fourth Claims for Relief, dated April 3, 2008, the aspects of the Decision they seek to enforce are not in their favor, because they allowed the District to implement the December 4, 2006 IEP over the Brenneises' continued refusal to consent. See District's Motion to Dismiss Third and Fourth Claims for Relief, Document # 13, at 3:18-22. Thus, this claim should be dismissed for failure to exhaust and *Porter* does not excuse the Brenneises from the exhaustion requirement.

B. This Court Already Found The Brenneises Could Not Assert the Failure to Implement Claim, So the Second Counterclaim Should Be Precluded Under the "Law of the Case" Doctrine

Under the doctrine of "law of the case," a court is generally precluded from reconsidering an issue that has already been decided by the same court. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir. 1998), *citing United State v. Alexander*,

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106 F.3d 874, 876 (9th Cir. 1997); *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir. 1982). The doctrine applies where the issue in question was previously decided explicitly or by necessary implication. *Rebel Oil*, at 1093. This is not a limitation of a court's power, but rather a guide to discretion. *Ibid.* "A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *United States v. Alexander, supra.* Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion. *Id.*

In the Second Counterclaim, the Brenneises do no more than reassert the dismissed Third Claim for Relief with a different label slapped on it. Both the dismissed Third Claim and the Second Counterclaim relate to and allege the exact same facts, and seek relief for the same alleged harm. The only differences between the two claims are non-substantive. (Compare Amended Complaint, ¶ 26 with Counterclaim, ¶ 23). Attempting to plead the exact same claim under a different legal theory does not change the fact that this Court has already concluded that resolving the issue of whether discrete portions of the Decision that are on appeal should be implemented is "premature." *See also, Fleming v. Miles,* 181 F.Supp.2d 1143, 1150 (D.Or. 2001) (claim preclusion bars subsequent action based on the same facts and asserted injury notwithstanding that it asserts a different legal theory to justify recovery).

C. The Brenneises Do Not Sufficiently Plead Discrimination Under Section 504 or the ADA, and Therefore These Claims Must Be Dismissed

In any case, the Brenneises fail to state a claim under Section 504, the ADA, or either statute's implementing regulations. Thus, the First, Second, and Third Counterclaims must be dismissed for failure to state a claim upon which relief can be granted.

A Rule 12(b)(6) motion to dismiss is a challenge to the sufficiency of the pleadings set forth in the complaint, and is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica*

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Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the grounds for his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). Because the Brenneises' Counterclaims provide no more than different labels and conclusions on the same set of facts already plead in their Amended Complaint, their Counterclaims should be dismissed.

1. None of the Counterclaims Asserted by the Brenneises State A Claim for Violation of the ADA or Section 504

To establish a violation of Title II of the ADA, a plaintiff must show that (1) he is a qualified individual with a disability; (2) he was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and (3) such exclusion or discrimination was by reason of his disability. *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). "To establish a violation of Section 504, a plaintiff must show that (1) he is handicapped within the meaning of Section 504; (2) he is otherwise qualified for the benefit or services sought; (3) he was denied the benefit or services solely by reason of his handicap; and (4) the program providing the benefit or services receives federal financial assistance." *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). Analysis of Section 504 and ADA claims is generally coextensive. *Zukle v. Regents of the Univ. of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999).

A plaintiff seeking damages under Section 504 or the ADA in the education context must show "something more" than a mere denial of FAPE under the IDEA. *Sellers by Sellers v. School Bd. of City of Mannassas*, 141 F.3d 524, 529 (4th Cir. 1998); *Hurry v. Jones*, 734 F.2d 879, 886 (1st Cir. 1984); *N.L. v. Knox Co. Sch.*, 315 F.3d 688, 695 (6th Cir. 2003); *Brantley v. Independent Sch. Dist. No. 625*, 936 F.Supp. 649, 656-57 (D.Minn. 1996). Thus, a complaint must plead more than a disagreement about what should be contained in an IEP under the IDEA or whether an alleged failure to provide something through an IEP denied the student a FAPE:

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> The reference in the Rehabilitation Act to 'discrimination' must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special needs of a handicapped child are, and the educational placement of such children is often necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has been made, and that a different placement must be required under [IDEA], is not necessarily the same thing as holding that a handicapped child has been discriminated against solely by reason of his or her handicap.

Sellers, at 529, *quoting Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982). The requirement that something more than a violation of the IDEA be shown applies likewise to the ADA. *Brantley, supra*, at 657.

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In addition to needing to plead more than a violation of the IDEA, specific allegations of intentional discrimination or deliberate indifference are an essential element of a damages claim under Section 504 and the ADA. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135-1136 (9th Cir. 2001). Where public officials have exercised professional judgment in such a way as not to depart grossly from accepted standards among educational professionals, there can be no liability under section 504 or the ADA. *K.U. v. Alvin Independent School District*, 991 F.Supp 599, 604 (S.D. Tex. 1998) (lack of complete compliance without proof that district staff acted in bad faith or with gross misjudgment was not actionable), *citing Monahan,* at 1170 ("We do not read § 504 as creating general tort liability for educational malpractice"). Without pleading facts showing bad faith or gross misjudgment, alleged failures to implement a student's IEP are, "at most, errors in professional judgment" and not actionable under Section 504 or the ADA. *Brantley*, at 657.

2. The Brenneises Fail To Cite Any Section 504 Implementing Regulations, a Requisite Pleading Requirement To Establish A Claim For Damages for the Denial of FAPE

All three Counterclaims fail to plead how the alleged denials of FAPE violate Section 504 or the ADA. While the IDEA prescribes standards and procedures for students who qualify for special education under that law, Section 504 and the ADA are general civil rights statutes that merely prohibit discrimination based on a qualifying disability. Unlike the IDEA, these laws do not require substantial modifications to existing programs and do not create affirmative procedrues and standards for serving disabled individuals. *See, Southeastern Comm. Coll. v. Davis*, 442 U.S. 397, 411 (1979); *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

While neither Section 504 nor the ADA use the term FAPE, both the IDEA and the regulations promulgated under Section 504 do refer to a "FAPE." The ADA regulations merely incorporate the Section 504 regulations. 28 C.F.R. § 35.103(a) ("Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard that the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by federal agencies pursuant to that title"). Although the verbage is similar, the statutory definition of FAPE in the IDEA and the administrative definition of FAPE in the regulations under Section 504 are not the same. *Mark H. v. Lemahieu*, 513 F.3d 922, 939-40 (9th Cir. 2008).

The Ninth Circuit recently contemplated whether Section 504's regulations created a private right of action to enforce their FAPE requirements. This contemplation was necessary because federal regulations themselves cannot confer a private right of action to an individual ("[a]gencies may play the sorcerer's apprentice but not the sorcerer himself"). *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). The *Mark H.* court held, with respect to the Section 504 regulations requiring school districts to provide FAPE, that in order to be enforceable, they must "authoritatively interpret[] the statute." Regulations that expand the scope of Section 504, or any federal statute for that matter, rather than interpret it, cannot be privately enforced. *Mark H.*, at 939, *citing Sandoval*, at 284. This is consistent with the Supreme Court's ruling in *Davis*, where it cautioned that:

> If these [Section 504] regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals ... they would constitute an unauthorized extension of the obligations imposed by that statute.

Davis, 442 U.S. at 410.

Mark H. found that a Section 504 regulation ensuring that disabled children are provided

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an education that is designed to meet their individual needs as adequately as the needs of non-handicapped children are met, and not more, would be proper. *Mark H.*, at 936, 937. However, the court did not address the viability of any specific section 504 regulations. The *Mark H.* court concluded that although a private enforcement action for damages *may* be asserted under some or all of Section 504's regulations, such a claim fails without allegations specifically identifying the regulations claimed to have been violated and the nature of the violation. *Mark. H.*, at 925. In sum, a Section 504 claim cannot stand "[w]ithout some clarity about precisely which § 504 regulations are and stake and why…." *Id.*, at 938-39.

A fundamental flaw in the Brenneises' attempts to plead their claims is the complete absence of any specificity regarding the Section 504 regulations that are relied upon and how they were violated. *J.W.*, *supra*, at *7-9. The Brenneises' allegations focus entirely on whether T.B. received specific entitlements which only special education students may receive, such as services in an IEP or those made pursuant to a hearing officer's decision brought under the IDEA, and FAPE as defined by the IDEA, (See e.g., Counterclaim, ¶¶ 15-18, 23–31, 33).

In addition, these counterclaims fail entirely to recognize that the FAPE requirements under the IDEA and the Section 504 regulations are different. *Mark H.*, 513 F.3d at 924. Because they are different, "[p]laintiffs who allege violations of the FAPE requirements in the U.S. DOE § 504 regulations consequently may not obtain damages simply by proving the IDEA FAPE requirements were not met." *Id.*, at 933. Further, "unlike FAPE under the IDEA, FAPE under [Section] 504 is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the "design" of a child's educational program." *Id.* The reason for the emphasis on the design of the program is that the design involves some level of intent, and only intentional violations of the law can give rise to a claim for damages. *Duvall*, at 1138-1139; *Mark H.*, at 935-37.

Here, the Brenneises First Counterclaim alleges a procedural violation of the IDEA, i.e. failure to provide for T.B.'s g-tube feedings in his IEP as opposed to providing such services in

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a separate document. (Counterclaim, at 11:8-9).[2] While the District denies this allegation, even under the IDEA, mere procedural violations are not always actionable, nor do they necessarily rise to the level of a substantive denial of FAPE. *Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 820-821 (9th Cir. 2007). The Section 504 regulations contain bare bones procedural rights, which do not include an obligation to provide for g-tube feeding in an IEP. 34 C.F.R. §104.36. Thus, this does not meet the requirement of "something more" than an alleged violation of the IDEA, as shown by the fact the Brenneises made similar arguments in the due process hearing below, held pursuant to the IDEA. (OAH Decision, at 50:222). Moreover, this counterclaim fails to allege that T.B. was treated differently than general education students and fails to identify which specific Section 504 regulation was violated.

The Second Counterclaim states the District "fail[ed] and refus[ed] to comply with the OAH Decision [which modified T.B.'s IEP] … [t]hus Student was discriminated against solely on the basis of his disability." (Counterclaim, at 12:11-24; 13:21-26). A failure to implement either an IEP or a decision by OAH, which only a disabled student is eligible for, does not even imply, much less establish, that a student was not treated comparably to a non-disabled student or a flaw in the design of the child's program. *See Brantley*, *supra*, at 657 (summary judgment dismissal of ADA claim that IEP was not implemented). Nor is it reasonable to assume that Congress intended for every minor non-compliance with an IEP or a hearing decision under the IDEA, which does not allow for monetary damages, to create a cause of action for damages. *Blanchard*, at 938; *Mark H.*, at 928-929. The Brenneises' counterclaims assert no more than a denial of FAPE as defined by the IDEA, and therefore they do not state claims under Section 504 and the ADA.

The Third Counterclaim is similarly defective. It states that special education students have a right to be instructed by qualified teachers while being kept at home by their parents and T.B. was not. (Counterclaim, at 14:17-26). However, the Counterclaim does not state that T.B.

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[2] Although the allegations of the Counterclaim are unclear as to the source of the alleged requirements, the District assumes that the Brenneises are alleging the failure to include g-tube feedings in the IEP itself, as this was one of their contentions at the due process hearing. (OAH Decision, at p. 46, ¶ 204).

was treated differently than general education students in this regard or how. In fact, the Counterclaim specifically argues "California law provides that all special education students are entitled to be instructed by qualified teachers, even if they are required to stay at home for health reasons." (Counterclaim, at 14:17-19) Besides the fact this argument is belied by the claims the Brenneises made in the underlying due process hearing regarding T.B.'s stay put placement, it is not actionable under Section 504 or the ADA because it does not meet the comparability requirement.

Nor does the Third Counterclaim allege the requisite mens rea to receive the damages sought. The fact that the Brenneises allege a violation of the law does not meet the requirement that something more be plead, much less intentional discrimination. There are no facts plead showing an intent to discriminate. Although the Brenneises summarily contend that since the "obligation to comply with California law is clear and unequivocal," "the failure to comply was ... knowing and intentional," the law is obviously not that clear, as even the ALJ did not find any violation in this regard. Thus, the Third Counterclaim does state a claim for discrimination.

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D. The Court Should Strike the Brenneises' Counterclaims

If the Counterclaims are not dismissed, they must be stricken in any case. The Brenneises' untimely attempt to make an end run around Federal Rule of Civil Procedure 15(a) should be stricken under Federal Rule of Civil Procedure Rule 12(f). Rule 15(a) allows a party to amend a pleading once as a matter of course within certain time limits, or thereafter by written consent of its adversary or by leave of court "when justice so requires." The Brenneises already filed an Amended Complaint, and the District has already answered that Complaint. The so-called Counterclaim is an attempt to file a second amended complaint without leave of the court or consent from the District, as required by Rule 15(a). The new claims of discrimination could have been raised in the original Complaint or the Amended Complaint, and at least one of them is nearly identical to the Third Claim in the Amended Complaint. Compare Amended Complaint, Third Claim, with Second Counterclaim.

Courts may strike pleadings that attempt to circumvent the purposes of Rule 15(a). *See* *e.g.*, *Turner & Boisseau Chartered v. Nationwide Mutual Ins. Co.*, 175 F.R.D. 686, 687 (D.Kan. 1997); *Southern New England Tel. Co. v. Global NAPS, Inc.*, 2007 WL 521162, *4 -5 (D.Conn. 2007); *Bizouati v. City of New York*, 2008 WL 753886, *2 (E.D.N.Y. 2008).

In *Turner,* the plaintiff filed a complaint, the defendant filed a counterclaim and then amended that counterclaim, and plaintiff attempted to file a counterclaim in response to the defendant's counterclaims, a procedure not authorized by the Federal Rules of Civil Procedure. *Turner*, at 687. The court characterized plaintiff's action as an attempt to circumvent Rule 15(a) and struck the pleading, finding that the plaintiff instead should have sought leave to amend his complaint. This is what the Brenneises should have done in this case, too. Since they have failed to comply with Rule 15(a), their Counterclaims should be stricken.

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E. **The Court Should Sanction the Brenneises' Attorneys for Their Frivolous Conduct in Filing Their Second Counterclaim**

As explained above, the Second Counterclaim is simply a regurgitation of the recently dismissed Third Claim for Relief. By refiling the exact claim that has already been dismissed, without seeking leave of court to amend and establishing good cause to do so, the Brenneises and their attorneys have forced the District to incur additional attorneys' fees to respond to the filing, and have also further unnecessarily delayed resolution of this matter. More importantly, it appears the Brenneises' attorneys have acted in willful disregard of this Court's Order dismissing their failure to implement claim without leave to amend, by refiling the exact claim again, which suffers from the same infirmities, and makes no effort to meet the additional pleading requirements of Section 504 and the ADA, as outlined below.

Section 1927 of Title 28 of the United States Code allows this Court to shift the costs incurred by the District in responding to the Second Counterclaim, which unreasonably multiplies these proceedings. Section 1927 provides, in full:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

This section is "concerned only with limiting the abuse of court processes" and is "indifferent to the equities of a dispute and to the values advanced by the substantive law." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980).

In the Ninth Circuit, imposition of costs and fees under Section 1927 may be made on a finding that the attorney acted recklessly or in bad faith, following notice and an opportunity to be heard. *United States v. Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1346 (*quoting United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir.1983) *and Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir.1982)). While "bad faith" sounds as if it is a subjective standard, it has an objective meaning as well. *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir.1985) ("TCI"). Analogizing the objective "bad faith" standard to the standard for misconduct under Rule 11, the Court of Appeals stated:

> If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious. To put this a little differently, a lawyer engages in bad faith by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law. Our court has long treated reckless and intentional conduct as similar. A lawyer's reckless indifference to the law may impose substantial costs on the adverse party. Section 1927 permits a court to insist that the attorney bear the cost of his own lack of care.

Id., at 445 (internal citations omitted). The subjective "bad faith" standard, the Court explained, may apply where an offending attorney brings an objectively colorable claim for improper purposes, such as to impose costs on the other side. *Id.* In such a case, a court may impose section 1927 sanctions even on a prevailing party if the party, in bad faith, caused its adversary to bear excessive costs. *Id.* The fact that the Brenneises have re-pled, essentially verbatim, the same claim they had already filed, that this Court already dismissed, establishes bad faith here.

In addition to this statutory authority, a district court has the inherent power to impose sanctions on counsel who "willfully abuse judicial processes." *Roadway*, at 766; *accord, Barnd*, at 1342. There is little question the Brenneises' counsel's conduct meets this definition. Additionally, Local Civil Rule 83.1 allows this Court to impose sanctions where counsel fails to

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comply with the Federal Rules of Civil Procedure or any order of this Court. This Court should exercise that authority here to sanction this bad faith filing.

IV. CONCLUSION

The First and Second Counterclaims asserted by the Brenneises must be dismissed because they have failed to exhaust their administrative remedies on those claims. In any case, all three Counterclaims must be dismissed for failure to state a claim under Section 504 or the ADA, and this Court should impose sanctions on the Brenneises' attorneys for refiling a claim just recently dismissed by this Court. In the alternative, this Court should strike the Counterclaims in their entirety based on the Brenneises' effort to circumvent the requirement that they seek leave to amend before amending their complaint a second time.

DATED: August 4, 2008 MILLER BROWN & DANNIS

By: /s/ Amy R. Levine
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